IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.07.2005

CORAM:

THE HONOURABLE MR.JUSTICE K.P.SIVASUBRAMANIAM

W.P.No.6318 of 1996

M/s.Gupta Enterprises
rep. by its Partner
Mr.Krishna Kishore
279, Sydenham's Road
Madras-600 112. .. Petitioner

versus

1. The Principal Chief Conservator
   of Forests, 259, Anna Salai
   Madras-600 006.

2. The District Forest Officer
   Tirupattur Division
   Tirupattur, North Arcot
   Ambedkar District.

3. The District Forest Officer
   Satyamangalam Division
   Sathyamangalam-638 402.

4. The District Forest Officer
   Salem Division
   Salem. .. Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India for the issue of a writ of Mandamus forbearing the respondents from making any claim or demand for the payment of demurrage charges and/or penal interests from the petitioner with respect to the purchase orders (i) dated 7.9.94 in C.No.8266/94-S issued by the second respondent; (ii) dated 13.9.1994 in C.No.8306/94-L issued by the third respondent; and (iii) dated 8.9.1994 in C.No.9001/94-S issued by the fourth respondent.

For petitioner : Mr.K.S.Natarajan for
M/s.Anand Dasgupta & Sagar

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For respondents-1 to 4 : Ms.Selvi George
for Mr.V.S.Sethuraman
Special Govt. Pleader
(Forests)

ORDER

The petitioner, claiming to be the largest exporter of sandal wood, prays for a mandamus to forbear the respondents from making any claim or demand for the payment of demurrage charges and penal charges from the petitioner in respect of the purchase orders issued by notices dated 7.9.1994, 8.9.1994 and 13.9.1994 by respondents-2 to 4 respectively.

2. The petitioner was the successful bidder at the following auctions held for sale of sandal wood by the respondent/Forest Department:

Sl.No	*Place*	*Date*	*Quantity*	*Amount*	*Date of Confirmation*
1	Sathyamangalam	4/7/94	23 M.Tonnes	48,81,500/-	13/9/1994
2	Salem	6/7/94	63 M.Tonnes	1,43,48,000/-	8/9/94
3	Tirupattur	8/7/94	123.500 M.Tonnes	2,64,58,650/-	7/9/94

3. According to the petitioner, all the confirmation orders were received by them on 30.9.1994. It is their further case that purchases were for export and hence, exempt from sales tax, as provided under Section 5(3) of the Central Sales Tax Act. They had obtained export orders prior to the confirmation of the auction and hence, not liable to pay sales tax. In terms of the conditions of sale, the petitioner had deposited amount representing 5% of the total sale amount as Earnest Money Deposit. In terms of sales conditions, purchasers are required to pay the entire sale consideration along with administrative charges within 50 days from the date of receipt of the confirmation orders and delivery has to be taken within 75 days. However, the respondents were insisting on the payment of sales tax also along with the amounts to be paid by the petitioner. By letter dated 26.11.1994, the petitioner had informed the respondent about the export orders and that hence, they were not liable to pay the tax. In spite of several representations and requests, according to the petitioners, the respondents were refusing to accept the said legal position and continued to insist on the payment of sales tax. Repeated correspondence had no effect on the respondents and hence, the petitioner made a representation before the Principal Commissioner of Commercial Taxes on 15.4.1996 along with the circulars issued on the subject. But ultimately, nothing

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happened, resulting in inordinate delay in permitting the petitioners to make the due payments and to take delivery of the goods. As the petitioner was threatened of being burdened with additional charges like demurrage charges and penal interest on the sale amount, they again appealed to the respondents on 7.3.1996. However, by letters dated 11.3.1996 and 21.3.1996, the respondents had refused to consider any claim for waiver of demurrage and penal interest charges. Hence, the writ petition.

4. Separate and detailed counter affidavits have been filed by respondents-1 to 4 raising similar contentions which may be summarised as follows.

5. The conditions relating to sale are clear in the matter of demurrage charges and penal interest as contained in Condition Nos.9 and 11. Condition No.9 entitles collection of interest at 13% per annum on overdue instalment. Condition No.11 stipulates that if the purchaser does not take delivery within 75 days from the date of confirmation of the auction, till such time the delivery is taken, the purchaser shall be liable to pay demurrage of Rs.30/- per Metric Ton per day. Therefore, demurrage charges and penal interest, as claimed by the respondents, are correct. The instructions issued in this context by the Commissioner of Commercial Taxes are also very clear. The conduct of the petitioner aimed at evading payment of tax was very clear, and to cover up this default, the petitioner was making irrelevant allegations. According to Condition No.25 of the sale notice, the purchaser has to make to the Forest Department, one lumpsum payment of sales tax and surcharge on sales tax along with the first instalment of the sale amount. This was not complied with by the petitioner, even after having been informed. The petitioner was filing one writ petition after another and was unable to obtain any interim order in their favour. They have thus defaulted in the payment of sale amount. The petitioner did not also produce any export orders either on the date of sale or even subsequently. Therefore, the demand of sales tax was perfectly justified.

6. Mr.K.S.Natarajan, learned counsel appearing for the petitioner, contended that from the beginning, the respondents refused to consider that the petitioner having purchased the consignment pursuant to export orders, was not liable to pay sales tax as exempted under Section 5 of the Central Sales Tax Act. Though the petitioner was prepared to pay all the dues/instalments as and when they became due other than sales tax, they were prevented by the respondents from discharging the said obligation by insisting that the petitioner should pay sales tax also. The respondents were not prepared to accept any payment without including the sales tax. Therefore, the respondents cannot be heard to say that the petitioner had defaulted. As regards the liability to pay tax or not, the provisions of the Act as well as circulars issued thereon and also the judgments of this Court were very clear. But yet, the respondents went on blindly insisting on payment of tax. In short, according to the learned counsel, in terms of the provisions of the

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Act and the circulars, all that was required to claim exemption was that the export order or the export agreement must be one prior to the fall of hammer. That requirement was satisfied by the petitioner and hence, entitled to exemption under Section 5(3). The circular dated 23.4.1996 was very clear. But the authorities at the implementational level refused to act reasonably and subsequently, the first respondent also, without any justification, refused to view the issue in an objective manner. Subsequent to the filing of the writ petition, the entire tax liability had been secured by virtue of interim orders.

7. Per contra, Ms.Selvi George, appearing for the respondents, very vehemently contends that the petitioner, from the very inception, had been adopting devious methods to circumvent the basic obligations. Without placing before the authorities the alleged export orders/agreements, the petitioner went on refusing to pay sales tax. The entitlement to exemption was possible only on production of the export orders which was never complied with. It was only to delay his obligation to make payment of the sale price/instalments, the petitioner went on raising the issue of a liability of sales tax and to make it appear as though the petitioner was not at default. The instructions issued by the Government were very clear and the Department cannot overlook the instructions from the highest officials to collect the tax due. Learned counsel also contended that during the relevant period, there was a ban on export of sandal wood and hence, the claim that he had export orders cannot be sustained. Assuming that the petitioner had export orders/agreement the petitioner cannot rely upon the same, as the export itself was banned. The petitioner was venturing into a series of writ petitions and as he was not able to obtain any favourable orders, the petitioner had come forward again by filing one more writ petition for the same relief, which was impermissible.

8. I have considered the submissions of both sides and in the background of the pleadings and contentions as stated above, the following points would require determination:

(i) Whether in a case where the purchaser pleads that the purchase was made pursuant to an Export order/ agreement, he could be held liable to pay the tax as a pre-condition for the release?
(ii) Whether there was any ban order by the Government of India for exporting sandal wood during the relevant period?
(iii) Whether the respondents were justified in insisting payment of tax?
(iv) Whether there was any default on the part of the petitioner to comply with the conditions of sale and whether the petitioner was liable to pay demurrage charges and penal interest?

9. Point Nos.(i) and (iii):

It is true that Condition No.25 of the sale notice requires that the petitioner should pay in one lumpsum, sales tax and surcharge on

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sales tax at the time of confirmation of the sales. However, as provided under Section 5(3) of the Central Sales Tax Act, there is no liability to pay tax if the purchase is intended to be exported pursuant to any agreement or order with a foreign buyer. This position is reinforced by many circulars issued by the Commercial Taxes Department. It would be appropriate to refer to some of the letters/orders issued by the Government in the said context.

10. In a letter to the Chief Conservator of Forests in the case of the petitioner company itself, the Commissioner of Commercial Taxes, by letter dated 2.4.1986, had clarified that sandal wood purchased in the form of logs, when cut into sizes either to satisfy the statutory requirements or to conform to export orders, the characteristics of the original commodity will not be altered and would still satisfy the provision under Section 5(3) of the Central Sales Tax Act.

11. In a circular dated 10.7.1995, the issue as regards the genuineness of the claim by the petitioners who claimed that they are exempted from payment of tax under Section 5(3) of the Act was being clarified. It was clarified thereunder that the export order or agreement need not necessarily be shown at the time of the fall of the hammer at the auction, but a copy of such export agreement/date should be furnished. But the production of the agreement/order could await till just before the delivery by the Forest Department. The only requirement would be that the agreement/order should be prior to the fall of the hammer.

12. Responding to the representation of the petitioner, the petitioner company itself regarding the Forest Department insisting on payment of sales tax with reference to the very impugned dispute, the Principal Commissioner, Commercial Taxes, by his letter dated 16.4.1996, had informed the Principal Conservator of Forests that the instructions dated 10.7.1995 (mentioned in the previous paragraph) will govern. The exporter may be directed to produce the pre-existing agreement for export.

13. During the pendency of this writ petition, the question of necessity to pay tax on identical facts arose for consideration in the case of another exporter in W.A.Nos.94 to 96 of 2000 dated 26.4.2000 - M/s.LAVANYA ENTERPRISES Vs. STATE OF TAMIL NADU AND OTHERS. In that case, the petitioner was the successful bidder and the sale was confirmed on 17.3.1999. The bidder was asked to pay sales tax dues. But the bidder contended that they have contract with foreign buyer, which had been executed prior to the order of confirmation and was validly extended subsequently, and hence, they were not liable to pay tax in view of Section 5(3). After examining the provisions under Section 5(3) of the Act and referring to the judgment of the Supreme Court, in CONSOLIDATED COFFEE LIMITED VS. COFFEE BOARD, BANGALORE (AIR 1980 SC 1468), the Division Bench concluded as follows:

(i) The fact that the exporter had not produced any document to show

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that the purchase was in the course of export cannot change the real fact of the sale being in the course of export. There was no such condition contemplated in the sale notice. Therefore, the said objection cannot be countenanced.

(ii) The contention that since the purchaser had accepted the terms and conditions of sale and had participated in the auction, he was liable to pay tax, cannot also be accepted in view of the specific statutory entitlement under Section 5(3). The contract cannot stand in the way of a statutory benefit/right.

14. After holding so, the Division Bench took serious note of the impugned problem arising every year and specifically observed that the Government should solve the issue by incorporating the required clauses in the sale notice itself and the Forest Department should approach the Sales Tax Department for concrete guidelines as to whether and under what circumstances the purchasers of sandal wood are entitled to the benefits of Section 5(3) and that in the absence of specific conditions in the sale notice, the purchaser cannot be blamed.

15. The judgment of the Division Bench, therefore, has concluded the issue in favour of the petitioner, namely, that if the purchasers had a pre-existing agreement for export, that would be sufficient to claim the benefit of Section 5(3) and there was no liability to pay tax. There is no dispute over the fact that the terms of the sale agreement as interpreted by the Division Bench are the same as in this case of the petitioner. Therefore, the judgment of the Division Bench would apply to the case of the petitioner also. It follows that the insistence on the part of the respondents that the petitioner should pay tax as a pre-condition for releasing the commodity cannot be sustained.

16. Point No.(ii):

A contention was raised that during the relevant point of time, there was a ban of export of sandal wood. Not only the respondents have not produced any material to substantiate the same, but also the petitioner has placed before the Court, the letter showing that the Central Government had permitted the petitioner to export. Apart from the letters of the petitioner to the respondents referring to the permission granted by the Central Government, the petitioner has also placed before the Court the letter of the Government of India to the petitioner dated 28.11.1997 in Letter No.74/5/97/PC III/ 2791, which also refers to the earlier correspondence. Moreover, this defence by the respondents appears to be a routine defence which is blindly taken by the respondents without any effort to verify the facts correctly. The same defence appears to have been taken in the case dealt with by the Division Bench as dealt with in paragraph 19 of the Division Bench order and rejected by the Court. Further, as pointed out above, no positive material has been placed before the Court to show that export of sandal wood was banned during the relevant period. There is also no specific pleading by the Government/first respondent in his counter affidavit.

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17. Point No.(iv):

From the above discussion, it follows that the insistence on the part of the respondents that the petitioner should pay tax as a pre-condition for the release of the commodity cannot be sustained. The further defence by the respondents is that though the petitioner had merely stated that the purchase was pursuant to an export contract, the petitioner had never produced any such pre-existing order/agreement on the basis of which alone, the petitioner can disclaim the liability to pay tax. It is true that in none of the letters of the petitioner, the copy of the agreement had been enclosed. But the learned counsel for the petitioner has rightly contended that such a stand is taken by the respondents only in their counter affidavits before this Court and not in any of the many letters/replies sent by the respondents. Apart from the fact that the said assertion by the petitioner is not disputed by the respondents by referring to any letter calling upon the petitioner to produce the copy of the export agreement, I have also perused letters from the respondents filed in the typed set and I find that in none of the letters, the petitioners have been called upon to produce any agreement, vide letters dated 7.12.1994, 16.12.1994, 7.4.1995, 5.7.1995, 8.2.1996 and 11.3.1996. It is only in the letter dated 5.7.1995, which is a reply to a notice from the learned counsel for the petitioner, it is stated that the successful bidders can produce all documentation before the assessing officers and then get refund. This is possible only after the tax is paid. The petitioner had not been called upon to produce the export orders to avail the benefit of Section 5(3). On the contrary, in all the letters, the stand of the respondents had been consistent that as per the sale conditions, there was no connection with the export and import policy for the payment of tax as demanded. In all the said letters, the petitioner had been called upon to make the full payment as demanded, inclusive of tax. The positive claim of the petitioner of the export order was never doubted or challenged. The allegation that export order was not furnished is taken only in the counter affidavit and in the course of arguments.

18. It is also noteworthy that after the filing of the writ petition, by virtue of interim orders, the stocks had been allowed to be cleared by providing security for the tax and subsequently, by letters dated 21.6.2000, 28.6.2000 and 28.6.2000 to the three depots respectively, the petitioner had informed that they are forwarding Form-H together with copies of Bills of Lading and the orders of foreign buyer received by the petitioner prior to the participation in the auction, for verification by the Department. It was also stated that if any further clarification was required, they would furnish such clarification. Therefore, the subsequent events show that the export contracts have been furnished to the respondents. It is certainly open to the respondents to verify the genuineness of the agreements produced by the petitioner before absolving the petitioner's liability for tax.

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19. In the background of the above discussion, what remains to be considered is as to whether the petitioner could be held guilty of default so as to bear the liability of demurrage charges and penal interest. It is hardly necessary to mention that such a liability which is penal in nature would arise only in the event of any wanton or intentional default on the part of the petitioner and not if the petitioner cannot be blamed for the delay in the clearance of the stock. Facts disclose that on the other hand, it was the attitude and the approach of the respondents which had resulted in the stalemate. I had already referred to the views of the Division Bench on this issue regarding the very same stand by the respondents in the case of another exporter, and it was held that there was no obligation on the part of the purchaser to pay the tax if he shows that the purchase was pursuant to the receipt of the order. Correspondence between the parties clearly establishes that the Department was uncompromising in their demand for payment of tax and not being prepared to accept the payment without tax. It is not a proper defence to state that the petitioner could have paid instalments minus the tax amount. The fact remains that the Department was not entertaining requests made repeatedly for payment of the dues without the tax amount and it would be a pedantic approach to say that the petitioner should have at least paid the instalments. Such payment was not possible when payment of tax was made a pre-condition even for the first instalment. Repeated letters have been sent by the petitioners requesting to be absolved of the tax liability, which were consistently declined by the respondents and the petitioner was consistently directed to pay the tax first and seek for refund later. Therefore, I am unable to find any intentional or deliberate default on the part of the petitioner.

20. The liability to pay demurrage under Condition No.11 of the sale agreement arose for consideration in SRI MAHALAKSHMI FLOUR MILLS Vs. STATE OF TAMIL NADU - W.P.No.17292 of 1993 dated 15.6.2001. Jayasimha Babu,J., while interpreting the said clause, held that the question of liability to pay demurrage would arise only after the buyer had become the full owner of the property after payment of the sale consideration but does not clear the stock thereby placing the Government in the position of a bailiff (after title passes to the purchaser), with a duty to ensure the safety of the goods. Only in such circumstances, the levy of demurrage would be justified. With respect, I am inclined to agree. In this case also, demurrage is demanded for the period when the title continued to remain with the respondent.

21. It is true that, in that case, the learned Judge held that penal interest was payable by the purchaser. Such a conclusion was arrived at on the facts of that case which are not comparable to this case in which the petitioner's liability to pay tax is disputed, relying on Section 5(3) of the Central Sales Tax Act. In contrast, the judgment referred to above dealt with the issue of positive default/failure on the part of the buyer to pay the balance sale consideration. In this writ petition, we are concerned with a case

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of delayed payment for which the buyer cannot be blamed.

22. With the result, I am inclined to hold that the petitioner is not liable to pay either demurrage charges or penal interest. It is rather unfortunate that the Forest Department should continue to adopt a mechanical approach to the same problem arising every year instead of appreciating the need to coordinate with the Commercial Taxes Department and to formulate proper guidelines and to incorporate them in the sale conditions so that, the purchasers shall be made aware of and be bound by those conditions. As stated earlier, the Division Bench had pointed out that this problem was arising every year and the respondents should have taken care to incorporate proper conditions in the sale notice.

23. While allowing this writ petition, it is made clear that the entitlement for the benefit of Section 5(3) of the Central Sales Tax Act would be decided by the taxation authorities independently on the basis of Form-H and other papers submitted by the petitioner without being influenced by any of the findings contained herein, which have been rendered only in the context of liability for demurrage and penal interest. Whether the export orders are genuine and conform to the requirements under Section 5(3) of the Central Sales Tax Act or not are matters to be considered independently.

The writ petition is allowed subject to the above observations. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

ksv

To:

1. The Principal Chief Conservator
   of Forests, 259, Anna Salai
   Madras-600 006.

2. The District Forest Officer
   Tirupattur Division
   Tirupattur, North Arcot
   Ambedkar District.

3. The District Forest Officer
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4. The District Forest Officer
   Salem Division
   Salem.

+1cc to Special Govt. Pleader (Forests) High Court, Madras SR 30376

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